



STATE OF ARKANSAS
THE ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2015-072

June 30, 2015

Mr. Jim B. DePriest, Chief Legal Counsel
Arkansas Department of Correction
P.O. Box 8707
Pine Bluff, Arkansas 71611-8707

Dear Mr. DePriest:

You have requested my opinion regarding the Arkansas Freedom of Information Act ("FOIA"). Your request, made as the custodian, is based on a statutory subsection that authorizes the custodian, requester, or subject of personnel or employee evaluation records to seek an opinion from this office stating whether the custodian's decision regarding the release of such records is consistent with the FOIA.¹

Your request indicates that a citizen has requested certain documents under the FOIA. You have attached several documents that you believe are responsive to the request. You apparently have determined that each such document is a personnel record and that, with the exception of certain information you propose to redact, each such document is open to inspection and copying. You ask whether your decisions are consistent with the FOIA.

RESPONSE

My statutory duty is to state whether the custodian's decision with respect to personnel and employee evaluation records is consistent with the FOIA.

I must note as an initial matter that one part of the FOIA request is premised on – and takes as a given – an assumed fact. You have not identified which, if any, of

¹ Ark. Code Ann. § 25-19-105(c)(3)(B)(i) (Repl. 2014).

the attached documents are responsive *only* to that part of the FOIA request. Thus I am unable, in any event, to render an opinion on your decision regarding this part of the FOIA request because doing so would require me to test the accuracy of the assumed fact. An inquiry of that sort falls outside the scope of this opinion. I cannot act as a factfinder when rendering opinions pursuant to Ark. Code Ann. § 25-19-105(c)(3)(B)(i).

Regarding the other part of the FOIA request, having reviewed the records you submitted, I conclude:

1. Many of the documents are neither personnel nor employee-evaluation records. Because my statutory charge concerns only such records, I state no opinion on your decision to release documents that are neither personnel nor employee evaluation records.
2. One of the remaining documents is an employee-evaluation record. Because the conditions to release appear to be met, it is my opinion that your decision to release this document is consistent with the FOIA.
3. Three of the documents are audio recordings. They likely constitute personnel records that should be released, but only with certain redactions, necessary to avoid clearly unwarranted invasions of personal privacy. Because the recordings are not perfectly audible and because you did not provide a transcript, I am unable to determine the exact content of the records or the redactions that will be required in order for the recordings' release to be consistent with the FOIA.
4. You have not clearly stated how you have classified any of the documents. I am unable to determine from the face of two of the documents whether they are personnel records, employee-evaluation records, or combinations of such records. I consequently cannot review your decision regarding these records. The custodian must evaluate the surrounding facts and make this determination in order to properly classify the records and employ the proper test(s) for disclosure.
5. In my opinion, the remaining documents are properly classified as personnel records. In my opinion, your decision to release these records is consistent with the FOIA.

DISCUSSION

I. General standards governing disclosure.

A document must be disclosed in response to a FOIA request if all three of the following elements are met. First, the FOIA request must be directed to an entity subject to the act. Second, the requested document must constitute a public record. Third, no exceptions allow the document to be withheld.

The first two elements appear to be met in this case. As for the first element, the documents are held by Department of Correction, which is a public entity. As for the second element, the FOIA defines “public record” as:

writings, recorded sounds, films, tapes, electronic or computer-based information, or data compilations in any medium, required by law to be kept or otherwise kept, and which constitute a record of the performance or lack of performance of official functions which are or should be carried out by a public official or employee, a governmental agency, or any other agency wholly or partially supported by public funds or expending public funds. All records maintained in public offices or by public employees within the scope of their employment shall be presumed to be public records.²

All of the attached documents may fairly be characterized as reflecting the performance or lack of performance of official functions within the Department. Therefore, in my opinion, the documents are public records and must be disclosed unless some specific exception provides otherwise.

II. Exceptions to disclosure.

Under certain conditions, the FOIA exempts two groups of items normally found in employees’ personnel files.³ For purposes of the FOIA, these items can usually

² Ark. Code Ann. § 25-19-103(5)(A) (Repl. 2014).

³ This office and the leading commentators on the FOIA have observed that personnel files usually include: employment applications; school transcripts; payroll-related documents such as information about reclassifications, promotions, or demotions; transfer records; health and life insurance forms; performance evaluations; recommendation letters; disciplinary-action records; requests for leave-without-pay; certificates of advanced training or education; and legal

be divided into two mutually exclusive groups: “personnel records”⁴ or “employee evaluation or job performance records.”⁵ The test for whether these two types of documents may be released differs significantly.

When custodians assess whether either of these exceptions applies to a particular record, they must make two determinations. First, they must determine whether the record meets the definition of either exception. Second, assuming the record does meet one of the definitions, the custodian must apply the appropriate test to determine whether the FOIA requires that record be disclosed.

a. Personnel-records exception.

The first of the two most relevant potential exceptions is the one for “personnel records,” which the FOIA does not define. But this office has consistently opined that “personnel records” are all records other than employee evaluation and job performance records that pertain to individual employees.⁶ Whether a particular record meets this definition is, of course, a question of fact that can only be definitively determined by reviewing the record itself. If a document meets this definition, then it is open to public inspection and copying except “to the extent that disclosure would constitute a clearly unwarranted invasion of personal privacy.”⁷

documents such as subpoenas. *E.g.* Op. Att’y Gen. 97-368; John J. Watkins & Richard J. Peltz, *THE ARKANSAS FREEDOM OF INFORMATION ACT 187–89* (Arkansas Law Press, 5th ed., 2009).

⁴ Ark. Code Ann. § 25-19-105(b)(12): “It is the specific intent of this section that the following shall not be deemed to be made open to the public under the provisions of this chapter.... [p]ersonnel records to the extent that disclosure would constitute a clearly unwarranted invasion of personal privacy.”

⁵ Ark. Code Ann. § 25-19-105(c)(1): “Notwithstanding subdivision (b)(12) of this section, all employee evaluation or job performance records, including preliminary notes and other materials, shall be open to public inspection only upon final administrative resolution of any suspension or termination proceeding at which the records form a basis for the decision to suspend or terminate the employee and if there is a compelling public interest in their disclosure.”

⁶ *See, e.g.*, Op. Att’y Gen. No. 1999-147; Watkins & Peltz, *supra*, at 187.

⁷ Ark. Code Ann. § 25-19-105(b)(12).

While the FOIA does not define the phrase “clearly unwarranted invasion of personal privacy,” the Arkansas Supreme Court, in *Young v. Rice*,⁸ has provided some guidance. To determine whether the release of a personnel record would constitute a “clearly unwarranted invasion of personal privacy,” the court applies a balancing test that weighs the public’s interest in accessing the records against the individual’s interest in keeping them private. The balancing takes place with a thumb on the scale favoring disclosure.

The balancing test elaborated by *Young v. Rice* has two steps. First, the custodian must assess whether the information contained in the requested document is of a personal or intimate nature such that it gives rise to a greater than *de minimus* privacy interest.⁹ If the privacy interest is merely *de minimus*, then the thumb on the scale favoring disclosure outweighs the privacy interest. Second, if the information does give rise to a greater than *de minimus* privacy interest, then the custodian must determine whether that interest is outweighed by the public’s interest in disclosure.¹⁰ Because the exceptions must be narrowly construed, the person resisting disclosure bears the burden of showing that, under the circumstances, his privacy interests outweigh the public’s interests.¹¹ The fact that the subject of any such records may consider release of the records an unwarranted invasion of personal privacy is irrelevant to the analysis because the test is objective.¹²

Whether any particular personnel record’s release would constitute a clearly unwarranted invasion of personal privacy is always a question of fact.¹³

Even if a document, when considered as a whole, meets the test for disclosure, it may contain discrete pieces of information that have to be redacted. Some items that must be redacted include:

⁸ *Young v. Rice*, 308 Ark. 593, 826 S.W.2d 252 (1992).

⁹ *Id.* at 598, 826 S.W.2d at 255.

¹⁰ *Id.*, 826 S.W.2d at 255.

¹¹ *Stilley v. McBride*, 332 Ark. 306, 313, 965 S.W.2d 125, 128 (1998).

¹² *E.g.* Op. Att’y Gen. Nos. 2001-112, 2001-022, 94-198.

¹³ Op. Att’y Gen. Nos. 2006-176, 2004-260, 2003-336, 98-001.

- dates of birth of public employees (Op. 2007-064);
- social security numbers (Ops. 2006-035, 2003-153);
- medical information (Op. 2003-153);
- any information identifying certain law enforcement officers currently working undercover (A.C.A. § 25-19-105(b)(10));
- driver's license numbers (Op. 2007-025);
- insurance coverage (Op. 2004-167);
- tax information or withholding (Ops. 2005-194, 2003-385);
- payroll deductions (Op. 98-126);
- banking information (Op. 2005-194);
- unlisted telephone numbers (Op. 2005-114);
- home addresses of most public employees (A.C.A. § 25-19-105(b)(13));
personal e-mail addresses (Op. 2004-225); and
- marital status of employees and information about dependents (Op. 2001-080).

b. Employee-evaluation exception.

The second potentially relevant exception is for “employee evaluation or job performance records,” which the FOIA likewise does not define. But the Arkansas Supreme Court has recently adopted this office’s view that the term refers to any records (1) created by or at the behest of the employer (2) to evaluate the employee (3) that detail the employee’s performance or lack of performance on the job.¹⁴ This exception includes records generated while investigating allegations

¹⁴ *Thomas v. Hall*, 2012 Ark. 66, 399 S.W.3d 387; *see, e.g.*, Op. Att’y Gen. Nos. 2009-067; 2008-004; 2007-225; 2006-038; 2005-030; 2003-073; 98-006; 97-222; 95-351; 94-306; and 93-055.

of employee misconduct that detail incidents that gave rise to an allegation of misconduct.¹⁵

If a document meets the above definition, the document *cannot* be released unless all the following elements have been met:

1. The employee was suspended or terminated (i.e., level of discipline);
2. There has been a final administrative resolution of the suspension or termination proceeding (i.e., finality);
3. The records in question formed a basis for the decision made in that proceeding to suspend or terminate the employee (i.e., basis); and
4. The public has a compelling interest in the disclosure of the records in question (i.e., compelling interest).¹⁶

As for the final prong, the FOIA never defines the key phrase “compelling public interest.” But two leading commentators on the FOIA, referring to this office’s opinions, have offered the following guidelines:

[I]t seems that the following factors should be considered in determining whether a compelling public interest is present: (1) the nature of the infraction that led to suspension or termination, with particular concern as to whether violations of the public trust or gross incompetence are involved; (2) the existence of a public controversy related to the agency and its employees; and (3) the employee’s position within the agency. In short, a general interest in the performance of public employees should not be considered compelling, for that concern is, at least theoretically, always present. However, a link between a given public controversy, an agency associated with the controversy in a specific way, and an employee within the agency who commits a serious breach of public trust

¹⁵ *Id.*

¹⁶ Ark. Code Ann. § 25-19-105(c)(1); Op. Att’y Gen. 2008-065.

should be sufficient to satisfy the “compelling public interest” requirement.¹⁷

These commentators also note that “the status of the employee” or “his rank within the bureaucratic hierarchy” may be relevant in determining whether a “compelling public interest” exists,¹⁸ which is always a question of fact that must be determined, in the first instance, by the custodian after he considers all the relevant information.

The primary purpose of this exception is to preserve the confidentiality of the formal job-evaluation process in order to promote honest exchanges in the employee/employer relationship.¹⁹

III. Application.

We can now apply the foregoing to the attached documents, the pages of which I have numbered in the order submitted for ease of reference.

Many of the documents are neither personnel records nor employee-evaluation records. In my view, the documents appearing on the pages numbered 5-9, 11-20, 22, 24-25, 39-48, 53, 55-64, 66-72, and 74 – and the first and last emails on page 23 and all the emails on page 52 except the one dated March 3, 2015, 8:04 a.m. – are neither personnel records nor employee-evaluation records. My statutory charge to opine on whether the custodian’s decision is consistent with the FOIA is limited to personnel records and employee-evaluation records. Accordingly, I state no view regarding the custodian’s decision with respect to the documents described in this paragraph. It is entirely possible, of course, that most or all such documents are simply non-exempt public records open to inspection and copying under FOIA. The absence of any statutory duty or authority to opine with respect to such records should not be taken as a suggestion that the custodian’s decision with respect to them is inconsistent with the FOIA.

¹⁷ Watkins & Peltz, *supra*, at 217–18 (footnotes omitted).

¹⁸ *Id.* at 216 (noting that “[a]s a practical matter, such an interest is more likely to be present when a high-level employee is involved than when the [records] of ‘rank-and-file’ workers are at issue.”).

¹⁹ *Cf.* Op. Att’y Gen. 96-168; Watkins & Peltz, *supra*, at 204.

One of the documents – the one appearing at pages 3-4 – clearly was created by or at the behest of the employer to evaluate an employee, which makes this document an employee-evaluation record. Employee-evaluation records may be released only if all the elements listed above are met. It appears here that all the elements are met. Accordingly, your decision to release this document is consistent with FOIA, in my opinion.

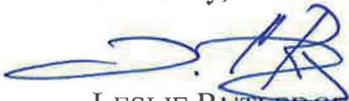
Three of the documents are audio recordings. They likely constitute personnel records that should be released, but only with certain redactions, necessary to avoid clearly unwarranted invasions of personal privacy. Because the recordings are not perfectly audible and because you did not provide a transcript, I am unable to determine the exact content of the records or the redactions that will be required in order for the recordings' release to be consistent with the FOIA.

You have not clearly stated how you have classified any of the documents. I am unable to determine from the face of the documents appearing at pages 49-50 and 75-89 whether they are personnel records, employee-evaluation records, or combinations of such records. I consequently cannot review your decision regarding these records. The custodian must evaluate the surrounding facts and make this determination in order to properly classify the records and employ the proper test(s) for disclosure set out above.

Finally, in my view, the bulk of the remaining documents are properly classified as personnel records. In my view, the release – unredacted – of the documents appearing at pages 1, 10, 21, 26-31, 36-38, 51, 54, 65, 73, and 90, the second email appearing on page 23, and the second email appearing on page 52, will not constitute a clearly unwarranted invasion of personal privacy. These documents, accordingly, must be released.

Assistant Attorney General J.M. Barker prepared this opinion, which I approve.

Sincerely,

A handwritten signature in blue ink, appearing to read 'L. Rutledge', is written over a circular stamp or seal.

LESLIE RUTLEDGE
Attorney General

LR/JMB:cyh